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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 197

HAENN SHIP CEILING AND REFITTING CORPORATION,

Petitioner,

vs.

KALCYON LINES AND VINKE AND COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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vs.

HALCYON LINES AND VINKE AND COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Haenn Ship Ceiling and Refitting Corporation respectfully prays that a writ of certiorari shall issue out of this Court directed to the United States Court of Appeals for the Third Circuit to review the judgment of that Court which modified a judgment which had been entered against the Petitioner in the United States District Court for the Eastern District of Pennsylvania, should your Honorable

Court issue a writ upon the petition (No. 62 of October Term, 1951) of Halcyon Lines and Vinke and Company, the third-party plaintiff below in this case.

Summary and Statement of Matter Involved

History of the Cause of Action

The original suit in this case was instituted by Salvadore Baccile. He named as defendants Halcyon Lines and Vinke and Company, alleging that they owned the Steamship "Stad Vlaardingen". The original defendant filed a third-party complaint against Haenn Ship Ceiling and Refitting Corporation, the employer of Baccile.

For brevity, we will hereinafter refer to the parties as "Baccile", "Halcyon" and "Haenn".

Before the "Stad Vlaardingen" arrived in Philadelphia in November of 1947, it had made a voyage from Montreal to Rotterdam and thence to Philadelphia. At Montreal, in order to equip the vessel to carry grain, Halcyon had caused equipment known as grain fittings to be installed in the ship. One of these appurtenances was a grain feeder which is a large square box without top or bottom. The vessel had an upper and a lower hold, but in carrying bulk grain the upper hold is not used. The lower hold is loaded with loose grain. The grain feeder, rectangular in shape (8 feet by 28 feet) and ten feet high, is built in the hatch opening and extends from the main deck to the top of the lower hold. Its function is to hold loose grain. As the grain in the lower hold settles during the voyage, grain from the feeder flows by gravity into the lower hold and fills up the spaces caused by settling.

After these feeders were installed at Montreal in October, the vessel was loaded with grain which it carried to Rotterdam. During the unloading there, the grain fittings

of the vessel were damaged (43, 44a).[1] This fact was known to the Master of the vessel but he took no steps to warn Haenn's employees when they came aboard the ship at Philadelphia.

Haenn is a shoreside company at Philadelphia which is engaged in supplying material and workmen. In the present case, these were furnished on a time, material plus percentage basis (61a). Baccile was employed as a carpenter by Haenn.

It is important to bear in mind that there were five or six separate holds in the vessel and that each was equipped with grain fittings including a feeder box. The accident in this case took place in the feeder at the No. 2 hatch. The hatch is the opening at the main deck to the hold. There was other work to be done in the lower hold but there was no connection between it and the work to be done in the feeder.

The work to be done by Haenn had been outlined for the ship by the Inspector for the Board of Underwriters. This Inspector's approval was necessary before the ship could load the cargo of grain which it was to carry from Philadelphia. The only work required and pointed out to Haenn in the No. 2 feeder was the tacking of burlap on the inside wall of the feeder, in order to prevent grain from sifting through the joints of the feeder walls into the upper hold (45a).

When the feeder had been constructed at Montreal, planks had been built into the bottom of it. These planks, referred to in the evidence as staging or stage planks, were

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[1] The record in this case has been filed by Halcyon, petition No. 62 of October Term, 1951, and all references are to the Appendix filed in the Court below by Haenn, Appeal No. 10,219, and material printed subsequent to the aforesaid appendices included in said record.

inserted at the bottom of the feeder for no other purpose than to be used for the convenience of the men who had to tack the original burlap and any workmen who might be called upon subsequently to replace or repair this burlap (115a, 116a).

Similar planking was erected in other feeders on the vessel and had actually been used by Haenn's employees including Baccile earlier on the day that the accident occurred. This use of the stage planking by the employees of Haenn was known to the ship's officers, who had observed the carpenters going about their work prior to the accident.

Late in the afternoon of November 25th, Baccile and another Haenn employee were sent to the No. 2 feeder to perform the rather small job of retacking the burlap there. In accordance with the custom of such shore workmen, at least, in Philadelphia and Montreal, they availed themselves of the stage planking at the No. 2 feeder. To get to the stage planking they used a ladder which was lowered into the feeder and rested on one of two stage planks in the No. 2 feeder. This was the normal manner in which to do the work. On one side of the feeder, Baccile went down on a plank and completed the job of retacking the burlap on that side. After completing his work on this side of the feeder, Baccile returned to the deck, and helped move the heavy ladder from the staging on which he had been working, to the staging on the other side. It was this stage planking which eventually fell.

When they put the ladder in place they tapped the plank twice with the bottom of the ladder. This is a usual and customary precaution. The plank appeared solid and Baccile then went down the ladder on to the stage plank which was nine inches wide. He stepped around the ladder and walked to the far end of the plank. He

examined the work to be done and began to walk back toward the foot of the ladder, to inform the men above as to the material he would need. Before he could get to the bottom of the ladder, the plank gave way and he fell to the bottom of the hold, receiving serious injuries.

The plank did not break but apparently one of the cleats supporting the end of it pulled away. This cleat had been covered by the torn burlap and was not seen by Baccile or any other Haenn employee prior to the accident.

History of the Case

Baccile sued Halcyon and based his action upon averments of negligence on the part of Halcyon, and a breach of the warranty of the seaworthiness of the vessel (7a). Halcyon denied liability to Baccile and then issued a third-party complaint against Haenn. Halcyon's third-party complaint originally sought full indemnity from Haenn (15a), but it was later amended so as to allege that Haenn was "jointly liable" with Halcyon, and that Haenn "should be required to *contribute* to the payment of any and all damages adjudged to the plaintiff". (Emphasis ours.)

When the case was called for trial, Halcyon settled with Baccile and agreed that judgment should be entered against it and in favor of Baccile. The case then proceeded to trial on the issue of Halcyon's right to recover contribution from Haenn.

While Halcyon's third-party complaint against Haenn was couched in the most general of terms, the issues actually litigated at trial and submitted to the jury founded Halcyon's right to contribution from Haenn upon two separate theories. Halcyon's theory No. 1 is clearly presented by its requests for instructions to the jury which were affirmed by the Trial Judge. Halcyon's first point for charge (138a) asked the Court to instruct the jury that

there was a duty on the part of Haenn to make an inspection and examination of the grain fittings. Further, Halcyon requested the Trial Judge to charge that if both the shipowner and Haenn "both failed to make proper inspections to determine whether the grain feeder in which the plaintiff was to perform his work was safe they were negligent. . . .". (Request No. 5, 138, 139a). These points were read to the jury (160a, 161a). Exceptions were taken to them (143a-165a).

The other theory upon which Halcyon based its claim for contribution from Haenn was that Haenn had failed "to perform the work of repairing grain fittings in the vessel in a careful and proper manner". (Halcyon's Requests for Charge, No. 1 and No. 2, 138a). Exception was likewise taken to this instruction.

On the question of Haenn's negligence, the jury returned a general verdict (See Answer to Interrogatory No. 1, 173a). An Interrogatory was propounded addressed to the respective degrees of fault on the part of the two parties, but that does not concern us in the petition in the present case. It is before the Court in connection with Halcyon's petition, No. 62, October Term, 1951.

In the District Court Haenn moved for judgment notwithstanding the verdict, for a new trial, and in the alternative to mold the verdict. The District Judge denied Haenn's motions for judgment notwithstanding the verdict and for a new trial, although the verdict was molded to provide that Halcyon and Haenn should contribute equal amounts toward the settlement which Halcyon had made with Baccile. We think it proper to add at this point that Haenn does not dispute the propriety of the settlement or the amount of the settlement which Halcyon made with Baccile.

Both parties appealed. Haenn contended, *inter alia*, that no liability could be imposed upon it for its alleged

negligence in failing to inspect and discover a defect in an appliance owned and furnished for its use by Halcyon.

The Court of Appeals affirmed the judgment holding Haenn liable, but it did so upon the ground that its independent examination of the record led it to conclude that the jury might have found "Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly". (Opinion, R. 185). (Emphasis ours.)

Thus affirmance of the judgment was predicated upon the theory that there was evidence which would support the verdict if the jury believed that Haenn had failed "to go about its work properly". The Court of Appeals did not consider that the jury might just as well have based its verdict upon Haenn's failure to inspect the stage planking before it permitted Baccile to work on it. Thus the Court below ignored the well settled rule that where there has been a general verdict, and the case has been submitted to the jury under instructions that they may find against the defendant upon either one of two theories, both theories of liability must be properly submitted. Otherwise a reviewing court is only speculating as to which theory formed the basis for the jury's finding.

Judgment was entered by the Court of Appeals for the Third Circuit on February 21, 1951. Halcyon filed its petition for certiorari on May 18, 1951. Upon the petition of Haenn Mr. Justice Burton entered an order on May 11, 1951 extending Haenn's time to file this petition to July 20, 1951.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 21, 1951. On May 11, 1951, Mr. Justice Burton entered an Order extending the time within which the Petitioner herein could file a Petition for a writ of certiorari to July 20, 1951.

The jurisdiction of this Court to entertain this course and to grant the same is provided in 28 U. S. Code Sections 1254 (1) and 2101 (c).

Opinions Below

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania denying the Petitioner's motion for judgment notwithstanding the verdict and for a new trial was filed April 3, 1950. It is reported 89 F. Supp. 765 and appears in the record, pages 41-46.

The opinion of the United States Court of Appeals for the Third Circuit written by Circuit Judge Kalodner for himself and Judges McLaughlin and Staley was filed February 21, 1951 and is reported 187 F. (2d) 403. It appears in the record on pages 183-189.

Questions Presented

I. Where the instructions of the Trial Judge to the jury permit the jury to base its general verdict upon either one of two theories and one theory is erroneous, can a reviewing Court sustain the verdict upon the ground that there was evidence to support recovery upon the correct theory and therefore was not required to examine the incorrect instruction.

II. Where a shipowner furnishes the employees of a shoreside contractor with an appliance which fails in normal use can the shipowner who has been sued by the injured employee recover contribution from the plaintiff's employer upon the ground that the employer was negligent in failing to inspect the appliance which the shipowner furnished and discover the defective condition which brought about the accident and injury to the additional defendant's employer.

III. Where a shipowner supplies an appliance to a contractor which is used in a normal manner, can the shipowner later claim that such use was negligent and a breach of duty to him.

IV. Is the warranty of seaworthiness which a shipowner owes to a stevedore injured on board his vessel (*Seas Shipping Company* v. *Sieracki*, 328 U. S. 85) likewise owed to a shoreside carpenter who comes aboard the vessel for the purpose of making it ready to receive cargo.

Reasons for Granting the Petition

I. The Court of Appeals recognized that the District Court had submitted the case to the jury upon alternative theories of liability. In its apparent haste to reach the question of contribution and to be the first Federal Court to adopt the so-called Pennsylvania Rule of contribution between joint tortfeasors in cases where one of the alleged tortfeasors is the employer of the injured plaintiff, the Court of Appeals passed over the more fundamental error in the case. That error was the submitting of the case to the jury upon two theories and the furnishing of a correct instruction to the jury upon only one of them.

Such a procedure is clearly in conflict with decisions by this Court and by numerous Courts of Appeal:

1. *Wilmington Star Mining Company* v. *Fulton*, 205 U. S. 60;

2. *Maryland Use of Markley* v. *Baldwin*, 112 U. S. 490.

Such a rule is in conflict with a host of decisions by the various Courts of Appeal. *Stokes* v. *United States*, 264 U. S. 14; *Atlantic Coast Line R. Co.* v. *Tiller*, 142 F. 2nd 718, (CA 4) reversed on other grounds, 323 U. S. 574.

This rule is followed without question in the lower Federal Courts, *Nowery* v. *Johnson*, 69 F. Supp. 755 at 759.

II. It is not clear whether the Court of Appeals conceded the validity of Haenn's argument that Halcyon owed the primary duty to furnish a safe place in which Haenn's employees could work, or merely passed over this question on the ground that recovery could be sustained on a second theory, namely that Haenn had failed to go about its work in a proper manner.

In doing so, it ignored established law that the mere failure to inspect an appliance furnished by another does not make the defendant whose fault lay in his failure to inspect a joint tortfeasor with the party who furnished the defective appliance. Rather the party whose fault lay in his failure to inspect and discover the defect is entitled to indemnity from the party who initially furnished the defective appliance or created the dangerous condition. This is so because the primary negligence is the latter's and the negligence of the party who failed to inspect is but secondary.

III. In refusing to instruct the jury that the vessel owner owed the employer the duty to furnish a seaworthy vessel, the District Court and the Court of Appeals refused to follow both the reasoning and the rule of this Court in *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85.

That decision has been extended to cover the case of a shoreside carpenter working on board a vessel who is injured by reason of a defect in one of the vessel's appliances. *Sulovitz* v. *United States*, 64 F. Supp. 637. It is plainly one of the bases of Baccile's complaint against Halcyon. If the shipowner is liable to an individual shoreworker because of his breach of the warranty of seaworthiness, there is no logical distinction which can be drawn between the shipowner's duty to furnish a seaworthy vessel to the

employees and the shipowner's duty to furnish a seaworthy vessel to the contractor. The employees are on board only as representatives of the contractor. The shipowner owes the same duty to the contractor as he does to the latter's employees. That warranty of seaworthiness was something upon which Haenn was entitled to rely just as was its employee, Baccile.

IV. The question of the circumstances under which contribution or indemnity may be sought where the injured party is the employee of a contractor performing work on board a vessel in navigable waters, has been the subject of much litigation.

There is confusion among the various Courts which have been confronted with the problem. That confusion seems to us to stem from the failure of the various Courts which have considered the problem to approach it correctly. Where the question is the right of contribution or indemnity, the Courts have failed to assess the underlying duties owed by one party to the other. They have confused the case of two actors acting in concert to produce an injury, with the case where one party had a right to rely upon the other party's fulfilling a duty which it owed to the first.

In *American Mutual Liability Ins. Company* v. *Matthews*, 182 F. 2nd 322, the Court of Appeals for the Second Circuit has indicated that there can be no duty owing by the contractor to the vessel. That Court has followed its own dictum in *Porello* v. *United States*, 153 F. 2nd 605 at 607 (reversed and remanded, 330 U. S. 446). That Court has taken the view that the right of contribution can accrue only when a common act has imposed a common liability upon them to the injured party. The Court of Appeals for the Second Circuit then concludes that since the Longshoremen's and Harbor Workers' Compensation Act wipes

out the injured employee's common law rights against his employer, that the two cannot be the subject of a common liability, and therefore there can be no contribution.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Rothchild International Stevedoring Company*, 183 F. 2nd 91, has held that the act of two wrongdoers had to be joint and simultaneous in order to bring about contribution or a division of the damages, but that where the injury to the third person was brought about by independent acts of negligence, one of which supervenes in time, the consequences of the first did not include the consequences of the second.

Thus the decisions by three Courts of Appeal involving suits for contribution or indemnity have all been made to turn upon the Court's notion of the duty which the employer owed to the injured employee. Rightly, these claims for contribution or indemnity in which one defendant seeks recovery from another should all be made to depend upon the duties which the two defendants owed *inter se*.

It is respectfully submitted that the questions here are important. This Court has been asked to review a decision which grants contribution to a party primarily liable from a party who was but secondarily liable for the injury to the third person. That, in itself, is an innovation, but when this Court is asked to consider the amount of the recovery which may be obtained in an action against the injured party's employer, then this Court should examine the entire problem. If it is to be the rule that a party who fails to discover the defect in an appliance furnished by another is thereby jointly liable, then this Court should be the forum to enunciate that departure from heretofore established doctrine. Wherefore, Haenn prays that this Honorable Court may grant this petition for certiorari and, if certiorari be granted to Halcyon in No. 62 October

Term, 1951, then Haenn asks that this Court review the entire problem.

Respectfully submitted,

HAENN SHIP CEILING AND REFITTING CORPORATION,

By THOMAS E. BYRNE, JR.,

Counsel for Petitioner.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

I. Where It Is Impossible to Determine Upon Which of Two Theories the Jury Based Its Verdict, Is It Error for the Court of Appeals to Affirm When It Disregards One Theory and Examines Only the Other to Determine Whether There Is Substantial Evidence to Support Such a Verdict.

In the instant case the Trial Court told the jury that it could find Haenn liable upon either one of two distinct theories. Haenn would be liable, said the Court, if it was (1) negligent in failing to inspect the plank before sending Baccile down upon it, or (2) negligent in going about its work in an improper manner. However, the point stressed by Halcyon during the trial was Haenn's alleged negligence in failing to inspect. It was the Plaintiff's first requested instruction (138a) and the most specific basis of liability given to the jury in the charge (161a). Quite naturally it was this theory of recovery which Haenn attacked most strenuously on appeal. Haenn argued that, even assuming negligence had been established on its part in failing to inspect, under the doctrine of primary and secondary negligence it could not be forced to contribute. The Court of Appeals, while recognizing that there were two possible theories of recovery, disposed of Haenn's main argument with these words:

> "On review of the record we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly." (R. 185). (Emphasis ours.)

Since the doctrine of primary and secondary liability assumes that Haenn was negligent in failing to inspect but

still precludes the enforcement by Halcyon of contribution, it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions. The opinion of the Court of Appeals indicates that it took one of two possible approaches to the problem. Either it conceded that the first theory was wrong but permitted recovery because the second theory had support in the evidence; or finding support for recovery on one theory, it felt that it was unnecessary to examine the other. Yet under the verdict rendered, there was no way in which the Court below could ascertain upon which theory the jury came to its conclusion. It is submitted that either approach to the problem is incorrect. The Court of Appeals must pass on every possible theory of recovery, which is *bona fide* contested, to determine if it is erroneous, when from the verdict it is impossible to determine how the jury came to its conclusion. The Court of Appeals for the Fourth Circuit succinctly states the Federal rule in *Atlantic Coast Line* v. *Tiller*, 142 F. (2d) 718, 722 (1944) reversed on other grounds, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465:

> "Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes* v. *United States*, 8 Cir., 264 F. 18, 23, as follows: ' . . . A general verdict under an erroneous instruction cannot be upheld, when there were two theories submitted to the jury, on either of which they might have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State*

> *of Maryland* v. *Baldwin*, 112 U. S. 490, 493 and S. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co.* vs. *First Nat. Bank of Sioux City* (8 Cir.), 85 F. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co.* v. *Percy Consolidated Mining Co.* (8 Cir.), 93 F. 166, 169, 35 C. C. A. 252, 255; *St. Louis, Iron Mtn. & Southern Ry. Co.* v. *Needham* (8 Cir.), 63 F. 107, 114 11 C. C. A. 56, 63, 25 L. R. A. 833; *What Cheer Coal Co.* v. *Johnson* (8 Cir.), 56 F. 810, 813, 6 C. C. A. 148, 151; *Cresswell Ranch and Cattle Co.* v. *Martindale* (8 Cir.), 63 F. 84, 90, 11 C. C. A. 33, 39." See also *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708."

This Court first considered the question in *State of Maryland* v. *Baldwin*, 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822. There the plaintiff, as an alleged heir, brought action on a bond of administrators of a decedent's estate. The administrators filed several pleas in defense, among which was a plea that the plaintiff was not an heir. The jury found a general verdict for the defendant. The opinion, by Mr. Justice Field, states:

> "On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered but its generality prevents us from perceiving upon which plea they found. If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

The Court then proceeded to examine the instructions to the jury in light of the evidence as to the plea of the plaintiff not being an heir. Finding error in the submission of that issue to the jury, this Court reversed and remanded.

The issue again came up in a negligence action which was before this Court in *Wilmington Star Mining Co.* vs. *Minnie Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708 (1906). The action was for wrongful death which occurred in a mine explosion. The complaint set out eight separate counts of negligence. The jury returned a general verdict for the plaintiff. On review this Court found that, under the evidence, no recovery could have been predicated upon three of the eight counts submitted to the jury. It therefore reversed.

To the same effect are the cases from the various Courts of Appeal cited in our reasons for granting this petition. In *New York and Porto Rico Steamship Co.* v. *Garcia*, 16 F. (2d) 734 (CCA 1934), the Court found improper the joining of two different and separate causes of action, which in view of the fact that a general verdict was returned, necessitated a new trial since it could not be determined upon which of the counts the jury based the verdict—the verdict being excessive if liability was imposed on one of the counts.

In *Baltimore and Ohio R. Co.* v. *Deneen*, 161 F. (2d) 674 (CCA4 1947), the reviewing Court found certain counts defective, and reversed on the ground that, a general verdict being returned, failure to instruct that no recovery could be had on such counts was prejudicial error.

The Courts of Appeal for the Sixth and Eighth Circuits have followed the rule laid down in *Maryland* v. *Baldwin, supra;* in *Baltimore & Ohio R. Co.* v. *Reeves*, 10 F. (2d) 329 (CCA6 1926); *Lyon, Potter & Co.* v. *First Nat. Bank*, 85 F. (2d) 120 (CCA 1898); and *St. Louis, I. M. & S. Ry. Co.* v. *Needham*, 63 F. 107 (CCA8 1894).

The later cases, *Baltimore & O. R. Co.* v. *Deneen, supra*, and *Atlantic Coast Line* v. *Tiller, supra*, apparently found the law so well settled that it was unnecessary to cite the

basis for it, but the earlier cases dwell upon the fact that the reviewing court was in no position to determine from either the evidence or the verdict whether the jury imposed liability on the correct or erroneous theory. The defendant cannot be forced to defend upon a multitude of theories, have them all submitted to the jury, and then see the verdict upheld because one of the possible theories of recovery was sustained by the evidence. The burden upon the defendant becomes unreasonable. The defendant denies liability, as here, on one theory. He says even assuming I am negligent, the law precludes recovery under these facts. The Court disregards his objections, and pointing to another facet of the case says look—here is sufficient evidence to support the verdict. However, in no way can it tell which issue or issues led the jury to its determination. Every safeguard against confusion and surprise in the law militates against such a practice.

The Rules of Civil Procedure prescribed by this Court for the Federal District Courts impliedly recognize the argument we here make. Rule 49 provides for the use of special verdicts at the discretion of the Trial Judge. No special verdict was returned here. We submit that Rule 49 recognizes that where recovery is sought on several theories, the Trial Judge and the Reviewing Court must know the ground for the jury's verdict before it is possible to deal justly and intelligently with it. It is not an answer to say:

> "There was sufficient evidence upon which the jury could reasonably find Haenn negligent, not merely in failing to inspect, but as well in failing to go about its work properly." (Opinion R. 185.)

Suppose the jury did not believe from the conflicting evidence on the point, that Haenn had failed to go about its work properly. The jury might well have been im-

pressed with the evidence tending to show that Haenn did not make a proper inspection. If that is so, Haenn is but secondarily liable and the judgment below is wrong in requiring one secondarily liable to contribute with the party primarily liable.

There can be no doubt there was a violation of the Federal rule which prohibits the affirmance of a general verdict based on more than one theory, unless all the theories are correct. In failing to determine whether all theories supported the verdict, error was committed and we must examine the theories under which the case was submitted to determine whether such error was prejudicial.

II. *Where a Shipowner Is Responsible for the Creation and Maintaining of a Dangerous Condition Which Gives Rise to an Injury to an Employee of an Independent Contractor Hired by the Shipowner, Can the Shipowner Recover Contribution from the Employer on the Ground That the Employer Was Negligent in Failing to Inspect and Discover the Negligent Condition.*

The Trial Court in this case submitted to the jury as one theory of recovery, the possible negligence of Haenn arising out of its failure to inspect the staging before sending Baccile down upon it. We need hardly point out that negligence of itself does not give rise to a cause of action. It does so only when the negligence is the breach of duty. The question then resolves itself into whether a failure to rectify a dangerous condition can throw liability upon Haenn for contribution under the facts presented here.

The facts are simply these. The staging in question was already installed in the ship on its arrival at Philadelphia. It formed a semi-permanent part of the structure of the ship. Haenn was hired, for the purposes of this case, to retack the burlap in No. 2 hold. To do so it used the stag-

ing already in the hold. Before doing so it did not inspect. When Baccile went down on the staging it appeared solid, but gave way after he had been on it for a minute or two. Baccile recovered from the ship and the ship demanded contribution. We say this as an implicit foundation of our contentions:

> If Haenn could have recovered *full indemnity* from Halcyon for any expenses incurred by reason of the injury to Baccile, Halcyon cannot recover contribution in any amount.

The answer to whether Haenn could have recovered full indemnity lies in the determination of whether the doctrine of primary and secondary negligence applies to this maritime case. The doctrine was first laid down by this Court in *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316. There the Gas Company's employees left off a manhole cover in the public highway, thus creating a dangerous condition. A third party was injured and recovered a judgment against the District of Columbia on the ground that it failed to keep its streets in a safe condition. The District sued the Gas Company for indemnity. This Court permitted full indemnity. It held that as between the City and the Gas Company the negligence of the one creating the dangerous condition was primary and the negligence of the District in failing to discover and rectify the defect was but secondary.

This Court further defined primary and secondary liability in *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217. There railroad A received a car from a connecting railroad with a dangerously defective coupler. A did not own the car. A carelessly failed to inspect the coupler and delivered the car in the same condition to B, another railroad, which also negligently failed to inspect

the coupler. As a result of its defective condition C, employed by B, is hurt, and obtains a judgment against B which B satisfies. It was held that B was not entitled to indemnity, for since it did not own the car, its only negligence was its failure to inspect. This was the same as B's. Therefore the negligence of both being the same, the Court said one could not be called primary in relation to the other. Distinguishing *The Washington Gaslight Co.* case, *supra,* the Court said:

> "It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other."

The *Washington Gaslight Co.* case and the *Union Stock Yards Co.* case laid the basis for the doctrine of primary and secondary liability. In applying the doctrine to maritime law Judge A. Hand said in *The No. 34, Petition of L. Boyer's Sons Co.,* 25 F. 2nd 602:

> "Here the negligence of Boyer's lighterman against which he gave no warranty was the primary fault and Boyer must indemnify Hogan because Hogan's neglect to inspect and discover the insecurity of the ladder was a secondary fault which would have caused no damage if Boyer's lighterman had not originally installed it in an unsafe way."

For proof that the doctrine of primary and secondary negligence is not dead, see the Opinion of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 at 89, where the doctrine is examined and laid aside as not applicable.

In any case where contribution or indemnity is the issue, it is necessary to examine the duties of the parties *inter se*. For the purposes of this petition we concede that Haenn owed Halcyon the duty to go about the work in a proper manner. We do not concede that Haenn owed Halcyon a duty to inspect the ship upon which it had been invited to bring its employees. Whether the theory of a warranty of seaworthiness, that of a business invitee, or that of a supplier of a chattel or a place to work be the one adopted, it is still very clear that Halcyon owed the duty to Haenn. It owed Haenn the duty to supply a seaworthy vessel, to use a high degree of care that its ship was safe for its business visitors, that the chattel it supplied was reasonably safe or that the place it supplied Haenn to perform the ship's work was reasonably safe. The duty is, of course, dependent upon the approach one takes to the problem. It had to be one such duty.

We concede that Haenn owed Baccile the duty to use reasonable care to furnish him with a safe place in which to work. But to say that because Haenn breached a duty which it owed to Baccile that it likewise breached a duty it owed to Halcyon is *non sequitur*. The duty ran the other way. Haenn's mere failure to discover Halcyon's breach of duty and protect Baccile from it, should not give rise to a cause of action by Halcyon against Haenn.

The correct doctrine permits a person who has been negligent in failing to discover and rectify a dangerous condition to obtain full indemnity from the party responsible for the creation of the condition. See *Restatement of Restitution*, § 95. Under the rule of the Restatement, the

person creating the dangerous condition, if he has been forced to pay damages because of injury to a third party, cannot enforce contribution from the one who was negligent merely in failing to inspect, discover, and rectify the danger so created.

The facts of the instant case show that Halcyon permitted the dangerous condition to arise either due to the damage to the feeder in Rotterdam or to some other unknown cause. The ship knew of the damage and failed to warn Haenn. With the staging in such condition it called upon Haenn to do work in the feeder. Haenn used the staging without first inspecting it. Even assuming such failure to inspect was evidence of negligence, Halcyon cannot demand contribution because it was primarily negligent in that through its negligence the dangerous condition was created. Therefore it was prejudicial error to submit the issue of the negligence of Haenn in failing to inspect as a basis of recovery.

Mention also might be made of the effect of this decision upon the doctrine of seaworthiness as laid down by your Honorable Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. There the Court held that the warranty of seaworthiness extended to a stevedore employee of an independent contractor engaged in unloading and loading. Since the *Sieracki* decision the lower courts have logically extended the warranty to cover the case of a shoreside carpenter injured on board the vessel by reason of a defect in one of its appliances. *Sulovitz* v. *United States*, 64 F. Supp. 637; *Eagle Indemnity Co.* v. *United States Lines Co.*, 86 F. Supp. 949; *Hawn* v. *Pope & Talbot, Inc., et al.* (Opinion of McGranery, Jr., D. C. E. D. Pa., filed 17 July 1951). It is submitted that the warranty of seaworthiness extends to the independent contractor, Haenn, as well as to its employee Baccile. This is the general rule as laid

down in *Harper, Law of Torts*, § 98 (1933 Ed.). Any other interpretation would be an undue restriction of the doctrine of seaworthiness which your Honorable Court has again and again said must be interpreted liberally. See *Seas Shipping Co.* v. *Sieracki, supra.* And since this warranty of seaworthiness extended to Haenn, Haenn had every reason to rely upon it and expect a seaworthy vessel had been supplied. It is submitted that in such a situation, the facts militate even more strongly to an application of the doctrine of primary and secondary negligence. *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, 51 LRA 781, 59 N. E. 657; *Union Stock Yards Co., supra.*

III. *Where a Shipowner Supplies an Appliance to a Contractor to be Used Aboard Ship, Can the Shipowner Later Claim That Such Use Was Negligent and a Breach of Duty to Him so as to Enforce Contribution, When the Appliance Was Used in the Normal Manner?*

From our investigation, while the answer to this question is embodied in the *Restatement of Restitution*, § 93, and has been passed upon by many courts both in this Country and England, it has never been considered by your Honorable Court. Yet it is a question of great practical importance.

The question has and will arise in almost every case where a longshoreman sues a shipowner and alleges that an appliance or appurtenance of the ship was defective. The longshoreman-plaintiff usually makes out his case against the original defendant, the shipowner, by showing that some equipment belonging to the ship was furnished for his use by the shipowner, and failed in use, causing him injury. Under the doctrine of the decision in this case, the shipowner can obtain contribution or perhaps full indemnity by showing that the plaintiff's employer failed to inspect and discover the defect in the ship's equipment

which was supplied by the shipowner. The result is incompatible with many decided cases, including the following:

Keller Building Co. v. *E. H. Titchener & Co.*, 190 App. Div. 135, 179 N. Y. S. 344 (1919), where the plaintiff, a contractor, furnished to the defendant, a sub-contractor, a defective scaffolding which hurt a workman. By statute the plaintiff was liable to the workman and paid him. Held that he could not recover from the defendant;

Mallory S. S. Co. v. *Druban*, 17 Ala. App. 365, 84 So. 874 (1920), where defendant furnished a defective derrick for the plaintiff's use as a result of which plaintiff's employee was hurt and the plaintiff required to pay damage. Held plaintiff could recover indemnification from defendant;

Pennsylvania Company v. *Roberts and Schaefer Company*, 250 Ill. App. 330 (1928), defendant built a defective sanding plant for the plaintiff. It fell upon the plaintiff's employee. Held that the plaintiff is entitled to indemnity for the amount paid to the customer;

Pfarr v. *Standard Oil Co.*, 165 Iowa 657, 146 N. W. 851 (1914), where defendant carelessly sold gasoline as kerosene. The plaintiff resold it and became liable to its customers. Held that plaintiff is entitled to indemnity for the amount paid to the customer;

Busch & Latta Painting Co. v. *Woermann Construction Co.*, 310 Mo. 419, 276 S. W. 614 (1925), where defendant supplied a defective scaffold to the plaintiff. It collapsed in use causing the plaintiff to be liable to an employee. Held the plaintiff was entitled to full indemnity from the defendant for the amount paid to employee;

John Wanamaker, New York Inc. v. *Otis Elevator Co.*, 228 N. Y. 192, 126 N. E. 718 (1920), where a defective elevator installed by the defendant for the plaintiff caused harm to a business guest of the plaintiff. Held that plain-

tiff could recover full indemnity from the defendant for amount paid to business guest;

Miller v. *New York Oil Co.*, 34 Wyo. 272, 243 Pac. 118, (1926) where defendant negligently installed a gas heating apparatus in the plaintiff's house which asphyxiated a tenant of the plaintiff. Held plaintiff could recover full indemnity from the defendant;

Mowbray v. *Merryweather*, L. R. (1895) Q. B. 857, where the defendant supplied defective equipment to the plaintiff for unloading a ship and an employee of the plaintiff was hurt. Held plaintiff could recover full indemnity from the defendant.

The result which Haenn contends is the correct one has already a basis in prior decisions of your Honorable Court. In *Dair* v. *United States*, 16 Wall. 1, 21 L. Ed. 491, the Court said:

> "It is, accordingly, established doctrine that whenever an act is done or a statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

This rule was followed by your Honorable Court in *Westinghouse Electric & Mfg. Co.* v. *Formica Insulation Co.*, 266 U. S. 342.

Halcyon as supplier here furnished the staging as part of the equipment of the ship. The staging had but one purpose, and it was used for that purpose. The ship knew of the use to which the staging was being put. Further the manner in which the staging was used was customary and normal. It would be *non sequitur* if the shipowner should now be permitted to contend that such use was a

negligent manner of going about the work and a breach of duty as to him.

This petition is conditional in that certiorari is not sought by Haenn unless this Court grants certiorari upon Halcyon's petition, No. 62, October Term, 1951. The reasons for that are practical rather than legal.

We urge that this Court would be operating *in vacuo* if it were to examine only the question of the extent of contribution. It should first promulgate the law as to when the right to contribution arises at all under maritime law.

We are not unmindful of the so-called "two court rule", but we suggest that there is such confusion of thought among the bench and bar on the subject of contribution that the rule loses force and should not be persuasive in the present situation. Solution of the problem of *when* contribution should be had should logically precede the answer to the problem of the amount of contribution. Proper solution of the first would make solution of the second unnecessary in our case as well as in many others.

Conclusion

The petition of Haenn for a writ of certiorari should be granted if Halcyon's petition (No. 62, October Term, 1951) is granted.

Respectfully submitted,

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